IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Petitioners,

—VS.—

CHARLES LEE RATLIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NATHANIEL R. JONES
JAMES I. MEYERSON
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

GEORGE VAN HOOK, JR.
307 South Hill
Post Office Box #474
El Dorado, Arkansas 71730
(501) 863-5119

Attorneys for Petitioners

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The Petitioners herein, Mrs. Carnell Russ and her several minor children, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 10, 1978.

Opinions Below

Without a formal opinion, the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, the Honorable Oren Harris presiding, issued an Order on November 10, 1978 denying the Petitioners Motion for Leave to Amend the jurisdictional averments and

to add a party Defendant (pursuant to Rule 15(c) of the Federal Rules of Civil Procedure). Said Order is not formally reported and is set forth herein, *infra,* as Appendix A.

A formal Order of Certification was entered by the District Court on December 8, 1978 It is not officially reported and is set forth herein, *infra,* as Appendix B.

A formal Order granting leave to take an interlocutory appeal herein was entered by the United States Court of Appeals for the Eighth Circuit on January 10, 1978. It is not officially reported and is set forth herein, *infra,* as Appendix C.

The opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 578 F. 2d 221 (8th Cir. 1978). Said opinion was entered on July 10, 1978.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 10, 1978. Jurisdiction of this Court is invoked, within ninety (90) days of the foregoing entry, pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Where a widow and eight surviving minor children of a Negro citizen sued municipal officials for the wrongful death of their husband and father (respectively), pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and liability was established over and against a municipal employee for constitutional wrong-doing resulting in the death of said Negro citizen, whether the Plaintiff should be permitted to add the municipal entity pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run against said municipal entity.

Statutory Provisions

This case involves Rule 15(c) of the Federal Rules of Civil Procedure. This subdivision is set forth herein, *infra,* as Appendix D.

Statement of the Case

The suit arises from the fact that on the afternoon of May 31, 1971, Carnell Russ, a young black man who was married and the father of a number of minor children, was unjustifiably shot and killed by Respondent Charles Lee Ratliff who at the time was a member of the police force of Star City, Arkansas.

Star City is a municipality established pursuant to Arkansas law. It is the county seat of Lincoln County, Arkansas and is located some miles south of the larger city of Pine Bluff.

Prior to the shooting Russ had been arrested for speeding by Trooper Jerry Green, of the Arkansas State Police, and had been taken to the local jail in Star City which at the moment was the charge of Respondent Ratliff. The shooting occurred after the deceased and the Respondent became involved in an agreement about bail for the deceased.

The suit was filed in 1973 by the widow and minor children of the deceased (Petitioners herein) who sought damages on account of the killing of their husband and father. Jurisdiction was predicated upon 28 U.S.C. 1983 and the Eighth and Fourteenth Amendments to the United

States Constitution. In addition to Ratliff, Petitioners named as defendants State Trooper Green, who had arrested the deceased and who was present when the shooting occurred, Norman Draper, who was also present at the shooting, who on that date was being trained as a Star City policeman, and who was to assume his position in that capacity on the very next day, and the mayor and members of the city council of Star City. The City itself was not made a party to the suit.

The defendants answered and denied liability.

The Respondent defended his own case. The mayor, the members of the council, and Draper were represented by the city attorney of the City of Star City, Arkansas. Trooper Green was represented by an Assistant Attorney General of the State of Arkansas.

The case was tried to a jury with the Honorable Oren Harris presiding.

At the conclusion of Petitioners' case the trial judge granted directed verdicts in favor of the mayor and councilmen and in favor of Draper. The case went to the jury as against Trooper Green and Respondent Ratliff and the jury found in favor of both of those defendants. The trial court denied Petitioners' motion for judgment notwithstanding the verdict or alternatively for a new trial. The original appeal followed.

The United States Court of Appeals for the Eighth Circuit, in a decision handed down on July 26, 1976, affirmed the directed verdict over and against Mr. Draper and the mayor and members of the Star City, Arkansas City Council and affirmed the jury's action insofar as it exonerated Trooper Green; but it vacated the jury verdict insofar as it exonerated Respondent Ratliff and held that, in the face of the aggravated circumstances of the case and the total

lack of justification for the Respondent Ratliff's actions, the jury verdict exonerating Respondent Ratliff could not stand, as a matter of law. See: *Russ* v. *Ratliff*, 538 F.2d 799 (8th Cir. 1976).

Believing that the Circuit Court below committed several errors to the extent that it affirmed the judgment of the District Court, the Petitioners sought a rehearing en banc; but, in an Order dated August 18, 1976, the Court below denied the same.

This Court denied an original Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit on January 10, 1977. See: *Russ* v. *Ratliff*, 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed. 2d 753 (1977).

Due to the procedural course that the case had taken during the trial, the Court below did not consider that Petitioners were entitled to judgment notwithstanding the verdict against Respondent Ratliff; and, as to him, the case was remanded for a new trial on all issues.

By the time the case got back to the District Court in 1977, Respondent Ratliff was no longer employed by the City and apparently had left the state. In any event, it seems highly doubtful that any substantial judgment against him would be collectible.

Confronted with the situation that has just been outlined, the Petitioners in September, 1977, filed a motion for leave to amend their complaint for the purpose of bringing the City of Star City, Arkansas into the case as a party defendant and asserting a claim against it on the basis of 28 U.S.C. 1331(a) read in connection with the Eighth and Fourteenth Amendments to the Constitution.

On November 10, 1977, the District Court, the Honorable Oren Harris presiding, heard arguments relative to the motion. The City of Star City, Arkansas was represented

by the very same city attorney who had previously represented the Mayor and City Councilmen of the City of Star City, Arkansas in the original pre-trial and trial proceedings held herein.

After considering the arguments, the District Court denied the Motion. Portions of the transcript of the proceedings on that date are set forth herein, *infra*, as Appendix E.

On November 10, 1977, the Court entered an Order denying the Motion. On December 8, 1977, the District Court entered an Order of Certification relative thereto; and on January 10, 1978, the United States Court of Appeals assumed jurisdiction over the interlocutory appeal.

As of that time, the City of Star City, Arkansas, was not considered a "person" suable under the provision of 42 U.S.C. 1983. See: *Monroe* v. *Pape*, 365 U.S. 167, 187-92, 81 Ct. 473, 5 L. Ed. 2d 492 (1961).

On July 10, 1978, the United States Court of Appeals for the Eighth Circuit entered an opinion and judgment affirming the action of the District Court in this regard. See: *Russ* v. *Ratliff*, 578 F. 2d 221 (8th Cir. 1978).

Believing that the Court below committed grievous error and that this case raises issues of substantial public importance, the Petitioners seek review from this Court. More specifically, they seek to have this Court clarify the legal definition of prejudice under Rule 15(c) of the Federal Rules of Civil Procedure and the degree to which an opposing party to a Motion thereunder must demonstrate the same in order to defeat such a motion.

Ultimately the Petitioners seek to have this Court determine whether a civil rights plaintiff, who has secured a finding of constitutional liability over and against a municipal employee for the wrongful death of a Black American

citizen, can amend his complaint jurisdictionally and add the municipal entity as a party defendant where he originally sued the Mayor and City councilmen of said municipal entity on several grounds, one of which is the grounds by which they seek to hold the municipal entity, itself, responsible for its employees' actions, notwithstanding that the statute of limitations has run against the municipal entity.

Reasons for Granting the Writ

1. This Court has never determined whether a civil rights plaintiff, who initially sues municipal officials for the wrongful death of an American citizen, pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and secures a finding of liability over and against a municipal employee, as a matter of law, for the constitutional wrongdoing, can subsequently amend the jurisdictional averments and add the municipal entity, itself, as a party defendant, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run against the municipal entity.

Where a civil rights plaintiff initially sued the mayor and city councilmen of a municipal entity for the wrongful death of a Black American citizen and where constitutional liability was established over and against a policeman employed by the municipal entity, the plaintiff should be permitted to add the municipality to the law suit, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run, unless the municipality is able to demonstrate prejudice.

The Amendment to add a jurisdictional averment and, in conjunction therewith, to add a party defendant herein (the City of Star City, Arkansas) did not change a single issue in this case.

It was simply designed to Permit the Petitioners to collect on an inevitable monetary judgment from the treasury of the City of Star City, Arkansas, under the doctrine of respondeat superior (pursuant to 1331 jurisdiction),* liability having been found over and against the Respondent for the wrongful death of the Petitioners' decedent while said Respondent was in the employ of the City of Star City, Arkansas.

Since the Respondent was acting by and for the City of Star City, Arkansas as its employee and agent when he shot and killed the Petitioners' decedent, the Petitioners sought, as a matter of law, to look to the City for recovery of a monetary award since they believed that the Respondent had fled the jurisdiction of the trial court and that, in any event, he was judgment proof.

Thus, in order to give the Petitioners a complete remedy for the egregious action of the Respondent, as an employee of the City of Star City, Arkansas, it was absolutely essential that the Petitioners be permitted to amend the com-

*Because of the views expressed by the Court below, the issue of liability of a municipality under the doctrine of respondeat superior, pursuant to federal jurisdiction under 28 U.S.C. Section 1331, was not addressed. See: Footnote seven (7) in the decision of the Court below, 578 F. 2d at page 224. Petitioners submit that jurisdiction does exist over and against a municipal entity pursuant to 28 U.S.C. Section 1331 directly under the Fourteenth Amendment to the United States Constitution, See: *Owen* v. *City of Independence, Missouri*, 560 F. 2d 925 (8th Cir. 1977) *Petition for Cert. Filed* 46 U.S.L.W. 3438 (December 27, 1977); *Gentile* v. *Wallen*, 552 F. 2d 193 (2d Cir. 1977); *Sanabria* v. *Village of Monticello*, 424 F. Supp. 402 (S.D.N.Y. 1976); *Reeves* v. *City of Jackson*, 532 F. 2d 491 (5th Cir. 1976); *Shifrin* v. *Wilson*, 412 F. Supp. 1282 (D.C.D.C. 1976), and that the doctrine of respondeat superior is applicable thereunder, See: *Sanabria* v. *Village of Monticello, supra*, notwithstanding that such doctrine is not applicable over and against a municipal entity under the Civil Rights Act of 1871 (42 U.S.C. Section 1983). See: *Monell* v. *Department of Social Services of the City of New York*, —— U.S. ——, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

plaint, jurisdictionally, and to add the necessary City defendant.

It is submitted that the City of Star City, Arkansas was on actual notice of the shooting incident and the legal action related thereto and heretofore prosecuted since its Mayor and Councilmen were initially defendants in the action before being dismissed by way of a directed verdict at the close of the Petitioners' case. It is obvious that the City of Star City, Arkansas must have been aware of this case since its officials themselves were aware of the law suit and since they retained counsel (the City attorney), collectively, for the purposes of defending themselves in their official capacities, counsel who represented the City itself in the context of the trial and appellate proceedings related to the motion *sub judice*.

In point of fact, the defendant Mayor and the defendant City Councilmen are so closely related to the City of Star City, Arkansas that the institution of law suit against them, initially, was in fact, an institution of the law suit against the City itself.

The trial Court below found the same when it concluded:

> "The Court: What is the difference between—as a matter of fact and reality—of the Mayor and City Councilmen having been defendants, wherein the case was tried; and the issues litigated, and the decision reached. And, then to bring the municipality in it—does not the Mayor and the City Council represent the City? Weren't they here as a Mayor and City Councilmen and therefore for the City of Star City, Arkansas."

See: Transcript of trial court proceedings below, November 10, 1977, at page 20, set forth in Appendix herein, *infra*. See also: Statement of Court at page 27 of transcript of proceedings, set forth in Appendix E herein, *infra*, where

the Court noted that: "Nobody could represent the municipality—Star City, except I presume the Mayor and City Council."

In effect, the District Court below denied the motion to amend and to add a party defendant because it did not believe such an amendment could be made to litigate liability under another theory and because apparently it presumed that an entire trial, both as to liability and damages, would have to be effected, substantially prejudicing the City of Star City, Arkansas. See: Transcript of trial court proceedings below, November 10, 1977, at pages 27-28, Appendix E herein, *infra.*

Needless to say, an amendment can be made to change a jurisdictional basis and to assert new theories arising out of the basic occurrence and transaction through which liability is sought. See: *Doran* v. *Lee,* 287 F. Supp. 807, 813 (W.D. Pa. 1968); *International Ladies Garment Workers Union* v. *Donnelly,* 121 F. 2d 561 (8th Cir. 1941). Moreover, a further trial on the issue of liability is not contemplated and is not necessary since the issue of liability has been resolved. The only issue is one of damages. See: Transcript of trial court proceedings below, November 10, 1977 at page 28, Appendix E herein, *infra.* Thus the only prejudice to the City was that it would, as a matter of law, incur liability as a consequence of the previously adjudicated finding of the same against its employee and in view of the compelling need for the same. No prejudice will result to the City by its joinder since the theory upon which the City is now sought to be held liable arises out of the same transaction and occurrence upon which Petitioners sought to secure liability over and against the Mayor and City Councilmen, to wit the wrongful death of the Petitioners' decedent by Respondent Ratliff. Significantly no additional evidence will have to be produced

since the theory holds the City liable, per force, under the doctrine of respondeat superior and attaches liability as to it on the already established liability over and against the Respondent, just as the Petitioners sought to hold the Mayor and City Councilmen liable thereunder (among other theories) *but failed solely because the jurisdictional averment foreclosed the same.* See: *Monell* v. *Department of Social Services of the City of New York, supra.*

As to the latter point, the Petitioners initially sought to hold the Mayor and City Councilmen of the City of Star City, Arkansas liable, in their official capacities, under the doctrine of respondeat superior as well as under the alternative doctrine of negligent entrustment; but the former theory was rejected both by the trial Court and the Court below under the precedent set forth in *Jennings* v. *Davis,* 476 F. 2d 1271 (8th Cir. 1973), cited by the Court below in its initial decision, herein where it set aside the jury verdict exonerating the Respondent and held that "under any version of the incident, the Police officer, Ratliff, who struck Russ with a pistol and then shot him, whether accidentally or otherwise, must be held to have used excessive force upon his prisoner." See: *Russ* v. *Ratliff, supra* at 538 F. 2d 805.

The doctrine of respondeat superior was rejected because the jurisdictional averment set forth by the Petitioners, more specifically 28 U.S.C. Section 1343 (3) and (4) in conjunction with the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and the Fourteenth Amendment to the United States Constitution, forecloses application of the same to the Mayor and City Councilmen in their official capacities. See: *Monell* v. *Department of Social Services of the City of New York, supra* at 56 L. Ed. 2d 636.

However, the impediment to a finding of liability under the doctrine of respondeat superior, when sought under

the foregoing jurisdictional averment, is eliminated when jurisdiction is invoked under 28 U.S.C. Section 1331 which provides for a direct cause of action under the Fourteenth Amendment when the damages sought are in excess of $10,000.00 (ten thousand dollars) exclusive of interest and costs, as they are herein. See: *Sanabria* v. *Village of Monticello, supra* at pages 410-411.

Thus not only is there an identity of interest in the underlying occurrence, upon which the action herein is based, between the City of Star City, Arkansas and the Mayor and City Councilmen in their official capacities, but there is an absolute identity of theory upon which liability is sought to be based, to wit: the doctrine of respondeat superior.

Save for the substantive liability which the City of Star City, Arkansas would incur under the doctrine of respondeat superior should it be joined to the litigation, there is no demonstrated prejudice. Certainly substantive liability cannot be the basis for demonstrating prejudice; for, if such were so, a proposed defendant could seek to avoid liability merely because he/she would incur the same. Such a result would be unjust and defeat the purposes of litigation, itself. See: Federal Rule 15 (c) Relation Back to Amendment, 57 Minn. Law Review 83 (1972).

2. The decision of the Court below conflicts with the decision of the Third Circuit Court of Appeals as that Court has defined the degree to which prejudice must be established under Rule 15 of the Federal Rules of Civil Procedure in order to foreclose the addition of a new party subsequent to the running of the statute of limitations.

In *Deakyne* v. *Commissioners of Lewes*, 416 F. 2d 291, 300 (3rd Cir. 1969), the Third Circuit Court of Appeals held:

> "Prejudice under the rule (15(b)) means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party."

It is submitted that the same principle applies under Rule 15 (c) of the Federal Rules of Civil Procedure and that the City of Star City, Arkansas failed to demonstrate any undue difficulty whatsoever in defending itself as a result of the proposed amendment herein.

The City of Star City, Arkansas, as an Amicus before the Court below, argued that it would be prejudiced if the Petitioners' Motion was granted since the City Attorney would have cross examined Trooper Green and brought out inconsistencies, of some substance apparently, to establish that he, rather than Respondent Ratliff, was responsible for the death of Petitioners' decedent and the constitutional liability attendant thereto. The City noted that the attorney for the Petitioners did not undertake to cross examine Trooper Green. See: Excerpts from Brief of the City of Star City, Arkansas, as Amicus Curiae, in the Court below, Appendix F herein, *infra*.

It is submitted that something more than mere articulation that prejudice will accrue is required where, as here, it is apparent that the reason for refusing the amendment, at least at the appellate level below, was the conclusion that the City's defense was prejudiced by the fact that Trooper Green and Norman Draper, both of whom testified in the initial case and both of whom gave pre-trial depositions (whereat the City attorney was present and had the opportunity to cross examine), no longer had any interest in the trial and by the fact that the Respondent is no longer employed by the City and has left the state. In that regard, the Court below wrote:

> "In this case it is obvious that the City was aware of the pendency of the suit since the mayor, city council-

men, and Draper were named as defendants and were represented by the city attorney. We are not persuaded, however, that the City would not be prejudiced in its defense if put to trial today in view of the fact that Trooper Green and Norman Draper no longer have any interest in the case and of the further fact that Ratliff is no longer employed by the City and may have left the state."

See: *Russ* v. *Ratliff, supra* at 578 F. 2d 224.

If in fact the proposed City defendant would be prejudiced by the absence of Ratliff from the jurisdiction or by the potentially non interested nature of Draper and Green, it is submitted that it was incumbent upon the City to demonstrate the nature of that prejudice, not merely articulate the same and lead the Court to a speculative conclusion based thereon.

Addressing itself to the burden to show prejudice, the Third Circuit wrote in *Deakyne* v. *Commissioner of Lewes, supra* at note nineteen (19) at page 300 that:

"... Professor Moore states the 'test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.' * * * 3 Moore supra note 12 at ¶ 15.13 [2] p. 993. In the instant case, a continuance would have enabled appellee to offer any additional evidence, directly or by way of cross-examination, to contest the testimony presented by the Town on the public use and maintenance of Anglers Road. A new trial will afford appellee the same opportunity.

We do not believe delay alone is a sufficient measure of prejudice. In a thoughtful article on Rule 15, Donnici, The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts, 37 S. Cal. L. Rev. 529 (1964), the author concludes that the element of delay is pertinent only to extent that it combines with some extrinsic occurrence which brings about actual and significant prejudice to the opponent. It is the existence of such prejudice, not mere delay, which Federal Rule 15 establishes as a basis for denying the amendment. Id. at 547-548."

It is apparent from reading the decision of the Court below in the initial appeal thereto that, based on "any version of the incident," See: *Russ* v. *Ratliff, supra* at 538 F.2d 804, ". . . if the applicable section of the Civil Rights Act, 42 U.S.C. Section 1983, is to have any meaning in the face of these aggravated circumstances, the jury's verdict exonerating Ratliff cannot be permitted to stand." *Id.*

Prior to enunciating that position, the Court had analyzed the evidence in the trial court below and quoted extensively therefrom. See: *Russ* v. *Ratliff, supra* at 538 F. 2d 802-804. It is clear that the decision and opinion are based almost exclusively upon admissions of the Respondent and corroborated in large degree by the testimony of both Draper and Green.

Both Draper and Green were examined prior to trial; and the testimony elicited thereat was virtually the same as that elicited from them during the course of Green's case in rebuttal.

At the bottom line, there is nothing which can be elicited from Green or Draper which will, in fact, change the result herein. The story has been told; liability found; and really, there is nothing more to do than to assess the damages.

That the City Attorney only participated through the Plaintiffs case in main does not establish any prejudice since the evidence which came out during Defendant Green's case had little, if any bearing, on the Respondents liability, or on Green's personal liability.

In that regard, the Petitioners sought to premise liability over and against Trooper Green on the theory that the Petitioners' decedent was in the custody of Trooper Green at the time of the episode making him technically responsible for the care and well being of the decedent, as a matter of law. In addition, the Petitioners also sought to premise liability over Trooper Green on the theory that, but for his failure to give the decedent a copy of the ticket (which he had previously issued), the altercation and ultimate death (with its attendant constitutional dynamics) would not have taken place. Certainly, in that respect the testimony through other witnesses was an effort at establishing the same.

At the bottom line, Petitioners submit that there is nothing concrete to establish the prejudice which the City of Star City, Arkansas asserts would occur if it was joined to this litigation at this point. Trooper Green, having been exonerated, as a matter of law, by the Court below (after trial below), can add nothing to the case which he did not otherwise testify to in generally consistent form in the trial below and in other proceedings attendant thereto and independent thereof.

At the very least, the City of Star City should have been required to particularize the inconsistencies in testimony which, by cross examination, would have substantially altered the nature of the outcome of this litigation (insofar as the liability of Respondent Ratliff is concerned and Trooper Green). If the City was unable to articulate

the inconsistencies which could have been brought out by cross examination, then at the very least it should have been required to demonstrate, by proffer, evidence which it could secure or would secure and which would have materially and substantially altered the outcome of the litigation. The point is, as the Court below initially pointed out in its first decision, there is no such evidence. The evidence, premised largely on admissions of Respondent Ratliff and corroborated to a large extent by Green and Draper, is overwhelming as to the liability of Respondent Ratliff.

The City's articulated position of prejudice is specious, at best, and falls short of the legal obligation it incurred to demonstrate the same in order to foreclose joinder under Rule 15 (c) of the Federal Rules of Civil Procedure.

3. The decision of the Court below is inconsistent with the decisions of this Court, which address themselves to amendments pursuant to Rule 15 of the Federal Rules of Civil Procedures, and the underlying principles governing the same.

It is submitted that, without the Amendment, the Petitioners will have successfully prosecuted a constitutional and civil rights oriented matter, successfully established a serious deprivation of constitutional and civil rights (resulting in death), successfully secured a substantial judgment; and they will not be able to execute upon the same.

Such would be unjust and a true miscarriage of justice.

There can be no doubt that, from the outset of this litigation, the Petitioners realized that, if they were to secure a monetary judgment, it would have to come from the treasury of the City of Star City, Arkansas.

The City of Star City, Arkansas employed Respondent Ratliff as a policeman; and it was in his function as a

policeman for the City of Star City, Arkansas that the Respondent shot and killed the Petitioners' decedent, without justification and in reckless disregard of his physical and bodily integrity.

Thus, the Petitioners, recognizing that under *Monroe* v. *Pape, supra*, a municipal entity was not a person as defined under the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and therefore not suable thereunder, sued in its place the Mayor, as Mayor, and the City Councilmen, as City Councilmen, recognizing and/or believing that recovery against them was, in effect, recovery against the City of Star City, Arkansas and, accordingly, payable out of the City treasury of the City of Star City, Arkansas.

Certainly, from the time that the Petitioners filed this law suit and continuing up to this very point in time, there has been a great deal of litigation revolving around the ability of an individual to recover damages over and against a municipality and out of its treasury for the deprivation of a constitutional right effected through the conduct of that municipality's employee.

While the Circuit Court below has for some time now adhered to the position that the doctrine of respondeat superior is not applicable under 42 U.S.C. Section 1983 to secure a monetary judgment from the municipal entity, through the naming of the Mayor (and premised upon the action of a municipal employee other than the Mayor), See: *Jennings* v. *Davis, supra*, it is only just recently that this Court addressed itself to said issue. See: *Monell* v. *Department of Social Services of the City of New York, supra*, where this Court adopts the foregoing position while overruling its holding in *Monroe* v. *Pape, supra* that a municipal entity is not a person under 42 U.S.C. Section 1983.

At the bottom line, then, is an aspect of law which is and has been in a great state of flux; and the Petitioners should not be penalized for the same where, as here, they have always looked to and toward the City of Star City, Arkansas and its treasury as the place where and from which they would ultimately secure damages if they prevailed in this litigation (as they have on the primary issue of liability).

It has been a long litigation and, as a consequence thereof, the Plaintiffs below (and the Petitioner herein) have been compelled to weather the waves of the storm which focuses around this very difficult question. To the extent that they are now benefiting from the length of this litigation, they should not be penalized for something which they have no control over (the state of the law).

To the extent they always sought recovery against the City of Star City, Arkansas, the refusal of the Courts below to grant the Petitioners leave to add said City (in effect re-name the previously sued Mayor, as Mayor, and City Councilmen, as City Councilmen) and to otherwise jurisdictionally amend, without any meaningful justification therefor, is inconsistent with the spirit of the Federal Rules and previously enunciated decisions of this Court which are designed to do substantial justice. See: *Foman* v. *Davis*, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L.Ed. 2d 222, 225-26 (1962), where the Court wrote in this vein:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decision on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits' *Conley* v.

Gibson 355 US 41, 2 L ed 2d 80, 78 S Ct. 99. The Rules themselves provide that they are to be construed to secure the just, speedy, and inexpensive determination of every action. Rule 1.

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15 (a) declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed 1948) 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

See also: *Conley* v. *Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 2 L. 2d 85-86 (1957); *Zenith Radio Corp* v. *Hazeltine Research*, 401 U.S. 321, 334-335, 91 S. Ct. 795, 28 L. Ed. 2d 77, 90 (1971); *United States* v. *Hougham*, 364 U.S. 310, 316-317, 81 S. Ct. 13, 5 L. Ed. 2d 8, 14-15 (1960) *Rehearing denied* 364 U.S. 938, 81 S. Ct. 376, 5 L. Ed. 2d 372 (1960).

In view of the foregoing, Petitioners submit that they should have been permitted to amend their complaint, jurisdictionally, and to add the City of Star City, Arkansas as a party Defendant to the action. Such action, in view of the identity of interest between the previously pled defendant City officials and the City, the absence of prejudice, and the magnitude of the constitutional violation, will assure that the Petitioners will secure the full and complete remedy to which they are entitled as a consequence of the egregious violation of the Petitioners' decedent federally guaranteed constitutional and civil rights and the wrongful death attendant thereto.

CONCLUSION

For the foregoing reasons, the Petition herein should be granted.

Respectfully submitted,

.....

NATHANIEL R. JONES
JAMES I. MEYERSON
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

GEORGE VAN HOOK, JR.
307 South Hill
Post Office Box #474
El Dorado, Arkansas 71730
(501) 863-5119

Attorneys for Petitioners

By: .....

October 5, 1978.

Certificate of Service

James I. Meyerson, Esq. one of the attorneys for the Petitioners herein, certifies that on the 9th day of October, 1978, I did serve three (3) copies of the foregoing Petition upon the attorney for the City of Star City, Arkansas by mailing the same, postage prepaid, first class, as follows: Odell Carter, Esq., City Attorney, City of Star City, Arkansas, Post Office Box # 598, Star City, Arkansas 71667. In addition, I served three (3) copies of the same upon the Respondent by mailing the same, postage prepaid first class, at his last known address, as follows: Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

.....

James I. Meyerson
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Attorney for Petitioners

By: .....

Appendices

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-73-C-96

MRS. CARNELL RUSS, ET AL.,

Plaintiffs,

VS.

CHARLES LEE RATLIFF,

Defendant.

ORDER

Complaint in this proceeding was intially filed on the 30th day of May, 1973, alleging that the civil rights of the plaintiffs' decedent had been violated, and alleging that this Court had jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 and the Fourteenth Amendment to the Constitution. The mayor and members of the city council of Star City, Arkansas were defendants, along with a former police officer of that city and others.

Pursuant to regular procedure, after extensive pre-trial proceedings, the matter was tried to a jury. During the trial and at the close of the evidence of plaintiffs, the Court directed a verdict in favor of the defendants, the Mayor and members of the city council of Star City, Arkansas. This ruling was appealed to the Court of Appeals for the Eighth Circuit, which affirmed the ruling of this Court in its opinion filed July 27, 1976. Rehearing was denied August 8, 1976. Petition for writ of certiorari to the United States Supreme Court was denied January 10, 1977.

Plaintiffs, on September 30, 1977, filed motion for leave to amend to add the City of Star City, Arkansas to this

action as a defendant, and to amend the allegations of the complaint to assert jurisdiction pursuant to 28 U.S.C. § 1331.

This matter has been filed some four and one-half years, has been the subject of numerous pre-trial proceedings and conferences, has been tried to a jury for a full week, has been on appeal to the Court of Appeals, which rendered a decision upholding the dismissal of the plaintiffs' complaint against the mayor and city councilmen of Star City, and the Supreme Court of the United States has denied certiorari. But for the remand of this cause for re-trial of the claims of the plaintiffs against Charles Lee Ratliff, there would be no action pending regarding the allegations of plaintiffs. The Court can perceive no reasonable justification for the delay in asserting for the first time that jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

Further, the motion has been expanded, seeking to have the former defendants, the mayor and city councilmen, again brought into this action as parties defendant. This despite a full hearing in a trial before a jury, the determination by this Court that plaintiffs had not made out a case against these defendants and granting a directed verdict, and the affirmance of this ruling by the Court of Appeals. The Court is satisfied that plaintiffs have had their full and fair opportunity to make out a case as to those defendants, have had their "days in court", and are not entitled to assert the same allegations of fact to seek damages against these defendants on the basis of a new theory. Res judicata must have some meaning, and the present motion presents all of the elements for its assertion as to the mayor and councilmen.

Plaintiffs have further filed motion for change of venue and suggested that the Court recuse himself because the

Court of Appeals reversed a determination of fact by the jury. The motion is supported only by affidavit of counsel.

The Court fully intends to set this cause for re-trial as to the allegations of plaintiffs against the remaining defendant, Charle Lee Ratliff, pursuant to the directions of the Court of Appeals, as expeditiously as the demands upon the time of this Court will allow. Delay in re-trial has been primarily due to the requirements of the Speedy Trial Act for giving first priority to criminal actions.

The Court has carefully reviewed the motions filed by plaintiffs and has determined that they are without merit at this stage of the proceedings. This Court, and a jury which will be selected from the entire Pine Bluffs Division by the random selection process, have no presumptive bias against the plaintiffs and their claims. Certainly this Court has no bias or resentment arising from the rulings of the Court of Appeals, or any other source in this matter.

IT IS, THEREFORE, ORDERED that the motions of the plaintiffs for the addition of parties defendant, for leave to amend their complaint to assert a new basis for their cause of action, for a change of venue, and that this Court recuse himself, be and the same are hereby denied.

Dated: November 10, 1977

/s/ OREN HARRIS
United States Senior District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CIVIL NO. PB-73-96

MRS. CARNELL RUSS, ET AL.,

Plaintiffs,

VS.

CHARLES LEE RATLIFF,

Defendant.

ORDER OF CERTIFICATION

It is the opinion of this Court that the attached Order and opinion attendant thereto inspire controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

/s/ OREN HARRIS
United States District Judge

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
Dec 8 1977
W. H. MCCLELLAN, CLERK

By: .....
DEP. CLERK

Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-73-C-96

MRS. CARNELL RUSS, ET AL.,

Plaintiffs,

VS.

CHARLES LEE RATLIFF,

Defendant.

ORDER

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Pursuant to regular procedure, after extensive pre-trial proceedings, the matter was tried to a jury. During the trial and at the close of the evidence of plaintiffs, the Court directed a verdict in favor of the defendants, the Mayor and members of the city council of Star City, Arkansas. This ruling was appealed to the Court of Appeals for the Eighth Circuit, which affirmed the ruling of this Court in its opinion filed July 27, 1976. Rehearing was denied August 8, 1976. Petition for writ of certiorari to the United States Supreme Court was denied January 10, 1977.

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action as a defendant, and to amend the allegations of the complaint to assert jurisdiction pursuant to 28 U.S.C. § 1331.

This matter has been filed some four and one-half years, has been subject to numerous pre-trial proceedings and conferences, has been tried to a jury for a full week, has been on appeal to the Court of Appeals, which rendered a decision upholding the dismissal of the plaintiffs' complaint against the mayor and city councilmen of Star City, and the Supreme Court of the United States has denied certiorari. But for the remand of this cause for re-trial of the claims of the plaintiffs against Charles Lee Ratliff, there would be no action pending regarding the allegations of plaintiffs. The Court can perceive no reasonable justification for the delay in asserting for the first time that jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

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The Court has carefully reviewed the motions filed by plaintiffs and has determined that they are without merit at this stage of the proceedings. This Court, and a jury which will be selected from the entire Pine Bluff Division by the random selection process, have no presumptive bias against the plaintiffs and their claims. Certainly this Court has no bias or resentment arising from the rulings of the Court of Appeals, or any other source in this matter.

IT IS, THEREFORE, ORDERED that the motions of the plaintiffs for the addition of parties defendant, for leave to amend their complaint to assert a new basis for their cause of action, for a change of venue, and that this Court recuse himself, be and the same are hereby denied.

Dated: November 10, 1977.

/s/ OREN HARRIS
United States Senior District Judge

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
Nov 10 1977
W. H. MCCLELLAN, CLERK

By: .....
DEP. CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1020—September Term, 1977

MRS. CARNELL RUSS, ET AL.,

Petitioners,

vs.

CHARLES LEE RATLIFF,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Petition for leave to take interlocutory appeal in this cause has been considered by the Court and is granted. The Clerk of this Court is directed to regularly docket this appeal.

January 10, 1978

APPENDIX D

Rule 15(c) of the Federal Rules of Civil Procedure

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

APPENDIX E

[20] • • •

The Court: What is the difference between—as a matter of fact and reality—of the Mayor and the City Councilmen having been defendants, wherein the case was tried; the issues litigated, and decision reached. And, then to bring the municipality in it—does not the Mayor and the City Council represent the City? Weren't they here as a Mayor and City Councilmen and therefore for the City of Star City?

Mr. Meyerson: Oh, I would agree. • • •

• • • • •

[27] Mr. Meyerson: That is correct, Your Honor.

The Court: The interpretation of Rule 15 (c) seems to be an unusual interpretation by counsel, at this particular stage of the case. It's a rather unusual—to me—a rather unusual argument that you merely can change jurisdiction in the case after it has been litigated under one theory, and then under this authorization you can completely avoid—or do away with the statute of limitations. Therefore, the Court just cannot see the position that is urged upon the Court here of having validity, and I am constrained to hold that the motion to add another party—and, the party being Star City, Arkansas—at this time, would—would stand. I think there is something to the contention of counsel for the City—the municipality of Star City about the passing of time and the standing—or the status of the parties that would be involved in it. Nobody could represent the municipality—Star City, except I presume the Mayor and the City Council. And, consequently, recognizing the importance of this matter, and the very great effort that is being made to do something for the plaintiff; the Court does not

Appendix E

feel that this action should be permitted at this time, and [28] the motion will be denied.

On the question of venue I cannot see that there would be any prejudice whatsoever—in view of the status of this case because counsel has already said to this court that there would not be any new evidence. It would be virtually the retrial as to liability. The Circuit Court of Appeals has virtually said liability is already established insofar as the defendant is concerned in the case, and therefore, the major question to be presented to a jury—the question of damage. • • •

• • • • •

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 78-1020

MRS. CARNELL RUSS, ET AL.,
Appellants,

VS.

CHARLES LEE RATLIFF,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

AMICUS CURIAE BRIEF OF THE CITY OF STAR CITY, ARKANSAS

BY: ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Attorney for Amicus Curiae

* * * * *

If the City of Star City, Arkansas, was made a party at this late date it would be very much prejudiced by the additional fact that Trooper Jerry Mac Green is no longer a party to this lawsuit and the City, therefore, would be precluded from bringing him back into this cause of action

and implicating him as it could have done if the City had been a party to the original suit in that the testimony of Mr. Green at the trial of Mr. Ratliff in the Circuit Court of Lincoln County, Arkansas, for manslaughter was vastly different from what it was on the trial of this case in Federal Court which could have made a difference in the outcome if these discrepancies had been pointed out, and if Mr. Ratliff had been adequately represented—he having represented himself—which all could very likely be to the detriment of the City of Star City if it had to defend at this time.

Furthermore, as admitted by the appellants the City of Star City, Arkansas, now has a different City Council, one of the old members, G. D. Smith, Sr., now being deceased, and the former Mayor, Lynn Thomasson, now being quite elderly, all of which would prejudice the City of Star City in its defense if it was now made a party defendant.

* * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Petitioners,

—VS.—

CHARLES LEE RATLIFF,

Respondent.

SUPPLEMENTAL APPENDIX

NATHANIEL R. JONES
JAMES I. MEYERSON
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

GEORGE VAN HOOK, JR.
307 South Hill
Post Office Box #474
El Dorado, Arkansas 71730
(501) 863-5119

Attorneys for Petitioners

October 13, 1978

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1020

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Appellants,

—vs.—

CHARLES LEE RATLIFF,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Submited: June 14, 1978

Filed: July 10, 1978

Before:

STEPHENSON, *Circuit Judge,*
INGRAHAM, *Senior Circuit Judge,**
and HENLEY, *Circuit Judge.*

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* The Honorable Joe M. Ingraham, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

HENLEY, *Circuit Judge.*

This civil rights case is before us on an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the United States District Court for the Eastern District of Arkansas (Senior Judge Oren Harris) denying plaintiffs leave to amend their complaint following a partial remand of the case to the district court after an initial appeal taken by plaintiffs from an adverse judgment on the merits. *Russ* v. *Ratliff*, 538 F.2d 799 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

The suit arises from the fact that on the afternoon of May 31, 1971 Carnell Russ, a young black man who was married and the father of a number of minor children, was unjustifiably shot and killed by Charles Lee Ratliff who at the time was a member of the police force of Star City, Arkansas.[1] Prior to the shooting Russ had been arrested for speeding by Trooper Jerry Green of the Arkansas State Police, and had been taken to the local jail in Star City which at the moment was in the charge of Ratliff. The shooting occurred after the deceased and Ratliff became involved in an argument about bail for the deceased. The facts in the case are fully set out in our original opinion and need not be stated here in any detail.

The suit was filed in 1973 by the widow and minor children of the deceased who sought damages on account of the killing of their husband and father. Jurisdiction was predicated upon 28 U.S.C. § 1343(3) and (4) read in connection with 42 U.S.C. § 1983. In addition to Ratliff, plaintiffs named as defendants State Trooper Green who had arrested the deceased and who was present when the shooting occurred, Norman Draper, who was also present

[1] Star City is a municipality established pursuant to Arkansas law. It is the county seat of Lincoln County, Arkansas and is located some miles south of the larger city of Pine Bluff.

at the shooting,[2] and the mayor and members of the city council of Star City. The City itself was not made a party to the suit.[3]

The defendants answered and denied liability.[4] The case was tried to a jury with Judge Harris presiding. At the conclusion of plaintiffs' case the trial judge granted directed verdicts in favor of the mayor and councilmen and in favor of Draper. The case went to the jury as against Green and Ratliff, and the jury found in favor of both of those defendants. The trial court denied plaintiffs' motion for judgment notwithstanding the verdict or alternatively for a new trial. The original appeal followed.

On that appeal we held that the district court did not err in directing verdicts in favor of the mayor, councilmen and Draper. We also held that the jury verdict favorable to the defendant, Green, was justified under the evidence. As to Ratliff, we expressed a directly contrary view. However, due to the procedural course that the case had taken during the trial, we did not consider that plaintiffs were entitled to judgment n.o.v. against Ratliff, and as to him the case was remanded for a new trial on all issues. In all other respects the judgment of the district court was affirmed. 538 F.2d at 805.

By the time the case got back to the district court in 1977, Ratliff was no longer employed by the City and seems

[2] On May 31, 1971 Draper was being trained as a Star City policeman and was to go to work the next day. However, when Russ was killed, Draper was not on the municipal payroll.

[3] As above stated, subject matter jurisdiction was predicated on the federal civil rights statutes. There was also a pendent claim for damages based on the Arkansas wrongful death statute. Ark. Stat. Ann. §§ 27-906 *et seq.* (Repl. 1962).

[4] Ratliff defended his own case. The mayor, the members of the council and Draper were represented by the city attorney. Trooper Green was represented by an Assistant Attorney General of the State of Arkansas.

to have left the state. In any event, it seems highly doubtful that any substantial judgment against him would be collectible.

Confronted with the situation that has just been outlined, the plaintiffs in September, 1977 filed a motion for leave to amend their complaint for the purpose of bringing the City into the case as a defendant and asserting a claim against it on the basis of 28 U.S.C. § 1331(a) read in connection with the eighth and fourteenth amendments to the Constitution.[5] Plaintiffs also filed other post-remand motions with which we are not concerned.

Judge Harris conducted a hearing on those motions in November, 1977 and denied them. This appeal involves only the motion for leave to amend the complaint so as to name the City as a defendant and to attempt to state a claim against it under § 1331(a). We affirm the order of the district court denying that motion.

The motion for leave to amend so as to bring the City into the case was filed more than six years after the death of Russ, and a problem of limitations is at once presented.

It is well established that in a suit brought under federal civil rights statutes the federal courts will apply the forum state's statute of limitations that is most apposite to the claim asserted. *See O'Sullivan* v. *Felix*, 233 U.S. 318 (1914); *Peterson* v. *Fink*, 515 F.2d 815 (8th Cir. 1975); *Brown* v. *United States*, 486 F.2d 284 (8th Cir. 1973), *aff'g Brown* v. *United States*, 342 F.Supp. 987 (E.D. Ark. 1972); *Johnson* v. *Dailey*, 479 F.2d 86 (8th Cir.), *cert. denied*, 414 U.S. 1009 (1973); *Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972); *Glasscoe* v. *Howell*, 431 F.2d 863 (8th Cir. 1970).

[5] As of that time, it was not considered that a political subdivision of a state, such as a county, city or town, was a "person" suable under the provisions of 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167, 187-92 (1961).

It is clear that if plaintiffs had sued the City initially in 1977, their claim would have been barred by any Arkansas statute of limitations that might be applicable to the case.[6] Counsel for plaintiffs contend, however, that in view of the provisions of Fed. R. Civ. P. 15(c), as amended in 1966, plaintiffs' claim against the City would relate back to the commencement of the action in 1973.

In relevant part, Rule 15(c) provides that for limitations purposes an amendment changing a party will relate back to the filing of the suit if (1) the party to be brought into the case has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In this case it is obvious that the City was aware of the pendency of the suit since the mayor, city councilmen and Draper were named as defendants and were represented by the city attorney. We are not persuaded, however, that the City would not be prejudiced in its defense if put to trial today in view of the fact that Trooper Green and Norman Draper no longer have any interest in the case and of the further fact that Ratliff is no longer employed by the City and may have left the state.

Additionally, the failure of plaintiffs to name the City as a defendant originally was not due to any mistake in the identity of the proper party to be sued. Throughout these proceedings the plaintiffs have been represented by

[6] The applicable statute probably would have been the three year statute that appears as Ark. Stat. Ann. § 37-206 (Repl. 1962); otherwise the applicable statute would have been the five year statute that appears as Ark. Stat. Ann. § 37-213 (Repl. 1962). *See* the discussions in *Brown* v. *United States* and *Glasscoe* v. *Howell*, both *supra*.

knowledgeable civil rights attorneys. Those attorneys chose as defendants persons whom they thought to be proper parties and who were proper parties. And they made no effort to join the City as a defendant with either § 1343 (3) and (4) or § 1331(a) as a jurisdictional basis until after they had tried the case on the merits and until they finally wound up with a single defendant who may be judgment proof.

Assuming arguendo, however, that if Judge Harris had permitted the amendment, it would have related back to 1973, the fact remains that the question of whether the amendment should have been allowed was one that addressed itself to the discretion of the district court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64, 68 (8th Cir. 1976); *Hale* v. *Ralston Purina Co.*, 432 F.2d 156, 159 (8th Cir. 1970); 6 Wright & Miller, Federal Practice & Procedure, § 1484, p. 418.

From the remarks made by Judge Harris at the conclusion of the hearing on the post-remand motions filed by plaintiffs and from the statements appearing in his order denying those motions, it is clear to us that he gave careful consideration to the motions, including the one with which we are immediately concerned, and determined that in view of the time element and of the history of the case

they should be denied. We cannot say that his action constituted error or abuse of discretion.[7]

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[7] The view that we take of the case renders it unnecessary for us to consider certain substantive questions that a case against the City would present. *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1977), *petition for writ of certiorari pending. See also Monell* v. *Dept. of Social Services of the City of New York*, —— U.S. —— (No. 75-1914, June 6, 1978), which overrules *Monroe* v. *Pape*, *supra*, at least to the extent that *Pape* holds that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983. We note, however, that *Monell* preserves the immunity of a municipality from tort liability on the basis of the doctrine of respondeat superior in § 1983 context, and it is on the basis of that doctrine that plaintiffs through their motion for leave to amend sought to hold the City liable.

Certificate of Service

James I. Meyerson, Esq., one of the attorneys for the Petitioners herein, certifies that on the 13th day of October, 1978, I did serve three copies of the foregoing Supplemental Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit upon the attorney for the City of Star City, Arkansas, Odell Carter, Esq., by mailing the same, postage prepaid, first class, as follows: Odell Carter, Esq., Post Office Box # 598, Star City, Arkansas 71667. In addition I did mail three copies of the same to the Respondent at his last known address, as follows: Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

.....

JAMES I. MEYERSON, Esq.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

By: .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Petitioners,

—vs.—

CHARLES LEE RATLIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF
OF THE
CITY OF STAR CITY, ARKANSAS

By: ODEL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Attorney for Amicus Curiae

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A

THE INTEREST OF THE AMICUS CURIAE

The interest of the Amicus Curiae is:

1. That although the City of Star City, Arkansas, is not a party to this petition, the purpose of the petition is to require the lower court to permit the petitioners to make the City of Star City, Arkansas, a party to the suit.

2. Since the petitioners are seeking to make the City of Star City, Arkansas, a party to the suit it has a vital interest in filing a brief opposing the relief requested by the petitioners, since if it is not permited to file a brief there will be no one to speak in opposition to the petition.

3. That the petitioners have consented to the filing of this brief by an Amicus Curiae; and that since the whereabouts of the respondent is unknown, his consent cannot be formally obtained but it is anticipated that he will have no objections nor file a brief of his own.

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Petitioners,

—VS.—

CHARLES LEE RATLIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF
OF THE
CITY OF STAR CITY, ARKANSAS

WHY WRIT SHOULD NOT BE GRANTED

POINT I

THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER THE CITY OF STAR CITY, ARKANSAS, TO GRANT RELIEF UNDER THE THEORY OF RESPONDENT SUPERIOR PURSUANT TO 28 U. S. C. SECTION 1331.

The petitioners' state in their motion for leave to amend the jurisdictional averments and to add Third Party Defendants that "the plaintiffs seek to add the City of Star City, Arkansas, to the action as a party defendant asserting that, as a matter of law, it is responsible for the wrong doing of its employee under the doctrine of respondent superior."

In determining whether or not a city is responsible under the doctrine of respondent superior, it is necessary to look to state law to determine whether or not a cause of action is permissible under such theory. It has long been held that the Eighth and Fourteenth Amendments to the U. S. Constitution applies only to state action. See *Brown v. City of Wisner, Louisiana*, et. al. 122 F. Supp. 736 at page 738 where it is stated:

> "There was no unjust discrimination by the state or the municipality. The Fourteenth and Fifteenth Amendments apply only to state action, as such, not two wrongs perpetrated by one individual upon another."

Purely private action is insulated from the Fourteenth Amendment. *McCain v. Davis* 217 F. Supp. 661 at page 666.

The Fifth Circuit Court of Appeals acknowledged the doctrine of immunity as late as 1976 in the case of *Reeves v.*

City of Jackson, Mississippi, et. al. 532 F. 2d 491 at page 495 where we find the following quotation:

> "We agree with the defendants that it is for Mississippi Courts and not the Fifth Circuit to do away with this blanket of immunity ..."

State immunity has also been held to be a good defense in the Ninth Circuit 1973 - in the case of *Boettger v. Moore* 483 F. 2d 86.

Perhaps the best response to the appellants' position is found in the decision of *Mitchell v. Libby* 409 F. Supp. 1098 (1976) at page 1099 where we find the following passage from the order of Chief Judge Holden, as follows:

> "In considering the present motion to dismiss, it is necessary to determine whether the plaintiff's complaint states a cause of action under the "federal question" jurisdiction provided for in 28 U.S.C. § 1331. More particularly, the issue is whether there exists a federal claim based directly upon the Fourteenth Amendment and the rights incorporated therein. Some support for such a cause of action is indicated in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (private Fourth Amendment cause of action against federal officials), and the concurring opinions of Justices Brennan and Marshall in *City of Kenosha v. Bruno*, 412 U.S. 507, 516, 93 S. Ct. 2222, 2228, 38 L. Ed. 2d 109, 118 (1973). The panel decision of the Second Circuit in *Brault v. Town of Milton*, 527 F. 2d 730 (2d Cir. 1975), would probable have been controlling in favor of the plaintiff's Fourteenth Amendment claim. But that court's en banc decision clearly recedes from holding that a direct cause of action exists under the

Fourteenth Amendment. Id. at 736-41. Therefore, such lower court decisions as *Perzanowski v. Salvio*, 369 F. Supp. 223, 228-31 (D. Conn. 1974), rejecting the direct cause of action argument, may be regarded as accurate reflections of the present state of the law in the Second Circuit. Hence the plaintiff's direct Fourteenth Amendment claim must fail."

Arkansas's municipalities are provided with immuinity from tort liability.

Arkansas Statute 12-2901 provides "State subdivisions immune from tort liability. It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State, shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees."

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE PETITIONERS' MOTION TO ADD THE CITY OF STAR CITY, ARKANSAS, AS A THIRD PARTY DEFENDANT SINCE ALL OF THE REQUIREMENTS OF RULE 15 HAD NOT BEEN MET BY THE PETITIONERS', AND SINCE TO DO SO WOULD HAVE BEEN PREJUDICIAL TO THE CITY OF STAR CITY, ARKANSAS.

In order to comply with Rule 15(C) of the Federal Rules of Civil Procedure all three requirements must be met. Tney are: (1) the amended claim must arise out of the same occurrence set forth in the original pleading; (2) within the period provided by law for commencing an action against him, the pruported substitute defendant must have received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) such purported substitute defendant must have or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

For reasons 2 and 3 above the Petitioners' motion to add the City of Star City, Arkansas, as a Third Party Defendant should not have been granted.

There is no conceivable way that the petitioners can contend that there was a mistake concerning the identity of the City of Star City, Arkansas, which they now claim was a proper party, at the time that they brought their original suit and their first amendment to original complaint. The style of both the original complaint and the amendment to complaint was as follows:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MRS. CARNELL RUSS, VERNA RUSS, a minor, age 14, ROOSEVELT RUSS, a minor, age 12, ANGELA RUSS, a minor, age 10, CURTIS RUSS, a minor, age 9, SYLVIA RUSS, a minor, age 8, ANTHONY RUSS, a minor, age 7, JOYCE RUSS, a minor, age 5, TRANCE RUSS, a minor, age 3, and PATRICIA RUSS, a minor, age 2, by their mother and next friend, MRS. CARNELL RUSS

Plaintiffs

vs. Civil Action No. PB73 C-96

CHARLES LEE RATLIFF, NORMAN DRAPER JERRY MAC GREEN, LYNN THOMASSON, Mayor of Star City, Arkansas, EARL GRUMBLES, NOEL LEACH, W. B. BURNS, SR., W. H. FRIZZELL, GUS DOZIER and G. D. SMITH, SR., members of the Council of Star City, Arkansas

Defendants

It will be noted that the petitioners were very conscious of the identity of the City of Star City at the time of the filing of the original complaint and at the time of the filing of the amendment to complaint since they specifically referred to the "Mayor of Star City, Arkansas" and to the "Members of the Council of Star City, Arkansas".

The case of *Simmons v. Fenton* (Seventh Circuit 1973) 480 F. 2d 133 is quite similar in several respects to the case here. In the *Simmons* case the plaintiffs sued a 12 year old girl by using the wrong first name when they intended to use the first name of the mother. The plaintiffs then sought to amend their complaint to add the correct Third Party after the Statute of Limitations had run. The court in the

Simmons case, after setting out the three requirements of Rule 15(C), as above mentioned, states, starting at the bottom of page 135 as follows:

> "Plaintiffs summarize their position by the following statement on brief: 'Inasmuch as the plaintiffs seek only to correct the Christian name of the intended defendant who was actually served with process and who both personally and through her representatives had full knowledge that these plaintiffs were in process of instituting suit against her; that her insurance representatives had fully and thoroughly investigated the circumstances attending the cause of plaintiff's complaint, it is believed that the granting of an amendment relating back to the original complaint will do no violence to the intendment of Rule 15(C) and that the circumstances of this case in fact fall squarely within the intent of said amendment.' They conclude by conceding 'in deference to intellectual honesty, that the defendant, Teresa Fenton, is technically entitled to the summary judgment which she seeks.' However, under the circumstances found present here and agreeable with the rationale of the cases they cite, plaintiffs continue to urge that Rule 15(C) requires that when an intended defendant is served with process under a mistaken name a plaintiff is entitled to the requested amendments of both the complaint and the service of process.
>
> Plaintiffs seek to do more than merely correct a mistake in the Christian name of an intended defendant caused by inadvertence of counsel. They are attempting to substitute parties defendant after the statute of limitations has run. A reading of Rule 15(C) expressly conditions the relation back of 'an amendment changing the party against whom a claim is asserted' upon

the concurrence of three prerequisites, viz.: (1) the amended claim must arise out of the same occurrence set forth in the original pleading; (2) within the period provided by law for commencing an action against him, the purported substitute defendant must have received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) such purported substitute defendant must have or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Clearly, the requirements of prerequisite (1) have been fully met. It is equally clear to us that the requirements of prerequisites (2) and (3) have not been met. The time within which the action against Doris J. Fenton necessarily had to have been brought expired on August 28, 1970. Even if it might be said that she should have known immediately of the case of mistaken identity when service was made upon her 12-year-old daughter or, to go further, even if the service might be said to have been upon her, Rule 15(C) is not satisfied, since actual service on whoever was served was not effected until September 22, 1970, at least three weeks after the tolling of the statute of limitations. Further, since Doris J. Fenton is not now before the court and, in fact, has never yet been served with process, there is clearly prejudice to her if the amendment is allowed. To allow the amendment will be to deprive her of the defense of the statute of limitations. Such a defense is a complete bar to the action, and to deny it makes the prejudice complete and final. This is in direct conflict with the language of the rule that she 'will not be prejudiced in maintaining (her) defense on the merits.'

> An adequate consideration of the basic principles to be applied in cases involving a change or alteration of the parties to an action pursuant to Rule 15(C) has been furnished by District Judge Grubb in *Aarhus Oliefabrik, A/S v. A. O. Smith Corp.*, E. D. Wis., 22 F. R. D. 33, 36 (1958): 'Thus, amendment with relation back is generally allowed in order to correct a misnomer of defendant where the proper defendant is already in court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.' "

The purpose of the 1966 Amendment to Rule 15(C) was to protect parties in the position of the City of Star City, Arkansas, from the methods which the petitioners now propose to use to bring the said City into the lawsuit. See the case of *Traveler's Indemnity Company v. U. S.*, for Use of Construction Specialties Company (1967) 382 F. 2d 103 at page 106 where we find the following:

> "The exercise of discretion in this area necessarily involves concern for the rights of the amending party; but the rights of the added party likewise cannot be ignored. Indeed, the very purpose of the 1966 Amendment to Rule 15(C) is the protection of the added parties' rights by enumerating the conditions that must be satisfied before relation back of the amendment will be allowed."

This cause of action accrued on May 31, 1971, the date of the death of Carnell Russ. A suit was filed on May 30, 1973, naming the mayor, and referring to him as the Mayor of Star City, Arkansas, as one of the defendants, and naming the Aldermen of the City of Star City, Arkansas, as others of the defendants, and referring to them as Members

of the Council of Star City, Arkansas. On September 17, 1975, the court entered an order granting a motion to amend the cause of action to include the Eighth Amendment to the Constitution of the United States and pendent jurisdiction to include the Arkansas Wrongful Death Act, being Arkansas Statute 27-906 and 27-907. As mentioned above the identity of the City of Star City was known to the plaintiffs at all times and yet no motion was filed to add the City of Star City, Arkansas, as a party defendant until September 30, 1977, several years after the Statute of Limitations had run.

In the District Court's order of November 10, 1977, the court observed "the court can perceive no reasonable justification for the delay in asserting for the first time that jurisdiction is invoked pursuant to 28 U. S. C. Section 1331." Apendix Page 2a

Such a finding by the court was certainly justified due to the length of time involved and due to the fact that it would be to the great prejudice of the City of Star City in that it would prevent them from raising their defense of the Statute of Limitations.

It was stated in the case of *Imperial Enterprises, Inc. v. Fireman's Fund Insurance Company* (1976) 535 F. 2d 287 rehearing denied 540 F. 2d 1085 that:

> "With respect to the cross-appeal, Fireman's Fund asserts that the District Court erred in not allowing it to amend its answer to allege a counterclaim against Imperial Enterprises. The counterclaim sought recovery of the amount allegedly paid mistakenly on the building policy. The District Court refused to permit it on the grounds of untimeliness and its permissive nature. In view of the untimeliness of the attempted amendment - - Fireman's Fund was aware of the facts underlying its alleged counterclaim for almost a year before it made its motion - - we are unable to conclude that the District Court abused its discretion in denying the motion to amend with respect to the counterclaim."

The motion for leave to amend complaint is within the court's discretionary power and failure to grant such motion is ordinarily not reversible error. *Hale v. Ralston Purina Company*, C. A. Ark. 1970, 432 F. 2d 156.

In a case involving the commencement of a second action alleging substantially the same claims brought by the appellant and by an additional party on behalf of still other parties, the District Court did not abuse its discretion in denying appellants' motion to amend its complaint and add or join parties plaintiff. *Buckley Towers Condominium, Inc. v. Buchwald* 533 F. 2d 934.

The granting of leave to amend pleadings pursuant to Rule 15 stating that leave shall be freely given when justice so requires is within the discretion of the Trial Court. *Zenith Radio Corporation v. Hazeltine Research, Inc.* 91 S. Ct. 795, 401 U. S. 321, 28 L. Ed. 2d 77, rehearing denied 91 S. Ct. 1247, 401 U. S. 1015, 28 L. Ed. 2d 552.

In a case where, for almost two years of pleadings, amendments, interrogatories, and all the other trappings of multi-parties, multi-issue trial, including trial itself, issue had been whether contract had been interferred with, not whether there had been an interference with the business relation, trial court did not abuse discretion in refusing proposed amendment of complaint to seek recovery for tortious interference with business relationship. *American Hot Rod Association, Inc. v. Carrier* 500 F. 2d 1269.

As pointed out by authorities hereinabove mentioned, permitting a party to amend its complaint to bring in an additional party after the Statute of Limitations has run is in itself prejudice as forbidden by Rule 15 (C). The Arkansas Statute of Limitations applicable to substantive offenses most closely related to that which the petitioners have alleged is the Arkansas Wrongful Death Statute which the petitioners herein were permitted to include in their first amendment to complaint. The applicable part of the Arkansas Wrongful Death Act is as follows:

> Arkansas Statute 27-906. Wrongful Death actions and their survivorship. "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been caused under such circumstances as amount in law to a felony.."
>
> Arkansas Statute 27-907. Parties and Limitations. "Every such action shall be brought by and in the name of the personal representative of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act shall be commenced within three (3) years after the death of the person alleged to have been wrongfully killed and not thereafter."

Under Arkansas law where there is an amendment to a complaint stating a new cause of action or bringing in new parties interested in the controversy, the Statute of

Limitations runs to the date of the amendment and operates as a bar when the statutory period of limitations has already expired. See *Bridgman v. Drilling* 218 Ark. 772, 238 S. W. 2d 645; and *Wilson v. Missouri Pacific Railroad Company* 58 F. Supp. 844.

The Third Circuit Court of Appeals in the case of *Ammlung v. City of Chester* (1974) 494 F. 2d 811 held that a federal civil rights action, which was commenced more than two years after plaintiff's son died of aspiration of vomit after being jailed and in which it was alleged that there had been illegal arrest, false imprisonment, illegal search and seizure, assault and battery, criminal negligence, cruel and unusual punishment and due process violations arising from failure to advise son of constitutional rights, did not sound in conspiracy, but if it did, action was barred by Pennsylvania Statutes of Limitation applicable to substantive offenses most closely related to that which defendants were alleged to have conspired to commit. In this case on appeal our applicable statute of limitation of the State of Arkansas applies and is as above set out.

In 1973 the case of *Reed v. Hutto*, 486 F. 2d 534, held that where Arkansas Statute 37-201 provided that suits for assault had to be brought within one (1) year, that actions founded on any contract or liability, expressed or implied, had to be brought within three (3) years, and that all other actions must be brought within five (5) years, civil rights action by prisoner against prison officials who allegedly failed to protect him from being forced to participate in homosexual acts with inmate trustee guard was required to be commenced within three (3) years and failure to do so required dismissal of action.

It can be seen from the foregoing authorities that the trial court in this case did not abuse its discretion in denying

the appellants' motion to add the City of Star City as a Third Party Defendant, but if the court had done so it probably would have been an abuse of discretion since the petitioners did not meet two of the three requirements of Rule 15(C) since (1) the amendment would have been to the prejudice of the said City of Star City in maintaining its defense, and (2) there was no mistake on the part of the appellants concerning the identity of the City of Star City at all times if it was in fact a proper party, and further the Statute of Limitations had run.

If the City of Star City, Arkansas, was made a party at this late date it would be very much prejudiced by the additional fact that Trooper Jerry Mac Green is no longer a party to this lawsuit and the City, therefore, would be precluded from bringing him back into this cause of action and implicating him as it could have done if the City had been a party to the original suit in that the testimony of Mr. Green at the trial of Mr. Ratliff in the Circuit Court of Lincoln County, Arkansas, for manslaughter was vastly different from what it was on the trial of this case in Federal Court which could have made a difference in the outcome, if these discrepancies had been pointed out, and if Mr. Ratliff had been adequately represented - - he having represented himself - - which all would be to the detriment of the City of Star City if it had to defend at this time.

Furthermore, as admitted by the petitioners the City of Star City, Arkansas, now has a different City Council, one of the old members, G. D. Smith, Sr., now being deceased, and the former Mayor, Lynn Thomasson, now being quite elderly, all of which would prejudice the City of Star City in its defense if it was now made a party defendant.

CONCLUSION

The action of the trial court in refusing to permit the petitioners to amend their complaint to add the City of Star City, Arkansas, as a party defendant, was not an abuse of discretion since to do so would be to the irreparable prejudice of the City of Star City, Arkansas, and since the identity of the City of Star City, Arkansas, was known to the appellants at all times and could have been made a party to the suit originally if it had been a proper party. Therefore, the petition should be denied.

Respectfully Submitted,

ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Amicus Curiae on behalf
of the City of Star City, Arkansas

CERTIFICATE OF SERVICE

I, Odell C. Carter, the attorney for the Amicus Curiae herein, certify that on the 2nd day of November, 1978, I did serve three (3) copies of the foregoing Brief of Amicus Curiae upon the attorney for the Petitioners by mailing the same, prepaid, first class, as follows: James I. Meyerson, 1790 Broadway, 10th Floor, New York, New York 10019. In addition, I have served three (3) copies of the same upon the Respondent by mailing the same, postage prepaid first class, at his last known address, as follows: Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

Odell C. Carter

ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Attorney for Amicus Curiae